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No. 80-6298

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LOIS MAE MILLS,
IN THE INTEREST OF
ARCHIE BURTON DUNCAN,
A CHILD, *Appellant,*

v.

DAN HABLUETZEL, *Appellee.*

APPEAL FROM THE COURT OF CIVIL APPEALS OF TEXAS

APPELLANT'S BRIEF ON THE MERITS

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QUESTION PRESENTED

Whether the one year statue of limitations of Texas Family Code Section 13.01 (1975) governing paternity and child support actions for illegitimate children violates the Fourteenth Amendment of the Constitution of the United States by discriminating against illegitimate children without any appropriate relationship to legitimate state interest.

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OPINIONS BELOW

The opinion of the Court of Civil Appeals, Thirteenth Judicial District of Texas is not reported (J.A. 15).

The Texas Supreme Court's decision to refuse Appellant's Writ of Error and Motion for Rehearing is not reported (J.A. 20).

STATEMENT OF JURISDICTION

The refusal of Appellant's Motion for Rehearing by the Supreme Court of Texas on December 10, 1980 (J.A. 20, 22), forever denies appellant the right to sue for paternal child support making the judgment of the Court of Civil Appeals (J.A. 16-19) Thirteenth Supreme Judicial District reviewable as a final judgment.

A notice of appeal to this Court was duly filed in the Court of Civil Appeals, Thirteenth Supreme Judicial District of Texas, and in the Supreme Court of Texas on March 6, 1981 (J.A. 22).

This appeal was docketed on March 7, 1981 in this Court within 90 days from the overruling of the Motion for Rehearing in The Supreme Court of Texas (J.A. 20). The jurisdiction of this court is invoked under 28 U.S.C. § 1257(2).

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STATEMENT OF THE CASE

Lois Mae Mills and the Texas Department of Human Resources filed a paternity suit on behalf of Archie Burton Duncan an illegitimate child (J.A. 2-6). The suit named Dan Habluetzel as Archie Duncan's natural father.

Suit was filed in the 156th Judicial District Court sitting in Sinton, San Patricio County, Texas on October 6, 1978. On the date of filing Archie Burton Duncan was one year, seven months, and twenty-four days old. Dan Habluetzel timely filed his written answer and pled the one year statute of limitations of Section 13.01[1] of the Texas Family Code (J.A. 7-8).

In an objection to a motion to dismiss in the trial court, the Appellant here claimed that Section 13.01 of the Texas Family Code violates the rights of illegitimate children under the 14th Amendment of the United States Constitution. The District Court, however, granted the Motion to Dismiss and entered a dismissal order against Lois Mae Mills and the Department of Human Resources. (J.A. 9).

Lois Mae Mills and the Department of Human Resources filed a timely appeal in the Texas Court of Civil Appeals, 13th Judicial District (J.A. 10). The Court of Civil Appeals affirmed. (J.A. 16-19). It ruled that Section 13.01 of the Texas Family Code did not violate the 14th Amendment. The Court's opinion states: "We have addressed these . . . [constitutional claims] and found them meritless in the *Texas*

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[1] The Texas legislature has amended Section 13.01 to create a four year statute of limitations. At this time, however, the governor has not signed the amendment into law. Texas Courts have ruled that the Texas Constitution Art. I Section 16 (1955) prevents the revival by statute of a cause of action once the limitation period has run because the limitation has become a vested right of the defendant. *Southern Pac. Transport Co.* v. *Texas,* 380 S.W.2d 123 (Tex. Civ. App.-Houston 1964, no writ), *Texas* v. *Williamson — Dickie Manufacturing Co.,* 399 S.W.2d 568 (Tex. Ann. App. Ft. Worth 1966, Ref. N.R.E.)

Department of Human Resources v. *Hernandez*, 595 S.W.2d 189 (Tex. Civ. App.-Corpus Christi 1980 Ref. N.R.E.). Based on the reasoning set forth in *Hernandez*, we overrule points of error 1 through 3." In *Hernandez* at 192, the Court of Civil Appeal said: "Section 13.01 is not unconstitutional. We overrule the points of error dealing with alleged violations of equal protection and due process." The Court thus considered and expressly rejected this federal constitutional claim.

A Writ of Error was filed in the Texas Supreme Court on the 18th day of April, 1980. The application for Writ of Error was subsequently refused, no reversable error, by the Texas Supreme Court on July 16, 1980 (J.A. 20). A motion for rehearing was overruled on December 10, 1980, by the Supreme Court of Texas. (J.A. 20).

Notice of Appeal was given to the Supreme Court of Texas and to the Court of Civil Appeals for the 13th Supreme Judicial District of Texas on the 6th day of March, 1981 (J.A. 22), and this cause was docketed in the Supreme Court of the United States on March 7, 1981. Probable jurisdiction was noted on April 27, 1981 (J.A. 24).

SUMMARY OF ARGUMENT

I. Texas Family Code Section 13.01 (1975) denies illegitimate children the equal protection of the laws in collecting child support afforded to legitimate children under Texas law and therefore is unconstitutional. Under the Texas Family Code 14.05(a) and 12.04, legitimate children have an ongoing judicially enforceable right to child support. Further, Texas Courts have held this right to be the personal right of the child that can be initiated at any time until the child turns 18.

Section 13.01, however, requires that if an illegitimate child, or someone on his behalf, wants to collect child support from the child's natural father, then a suit to establish paternity must be filed before the child turns one year old or the suit is forever barred.

This Court in *Gomez* v. *Perez* 409 U.S. 535 (1973) ruled that once a state creates a right for child support for legitimate chil-

dren then this right must not be denied to illegitimate children. *Gomez* struck down Texas' law that completely denied illegitimate children support rights from their natural fathers and implied that the state must accord to illegitimate children a procedure whereby paternity is proven and child support is obtained.

Texas' response to the *Gomez* mandate is Texas Family Code Chapter 13 Subchapter A. This response, particularly the one year limitations Section 13.01, can only be viewed as a belated and grudging attempt to do the absolute minimum for illegitimate children. In fact these provisions have greatly restricted the rights afforded to legitimates, after *Gomez*, by the Texas courts which had extended the same rights to file to both classes of children. *Alvarado* v. *Gonzalez* 552 S.W.2d 539 (Texas Civ. App. Corpus Christi, 1977 no writ).

The one year statute of limitations fails the heightened scrutiny test applied in *Mathews* v. *Lucas* 427 U.S. 495 (1976) and its progency because such a limitation period is not carefully tuned to alternative considerations nor is it substantially related to a permissble state interest.

A. The state interest in a one year limitation of actions asserted by Texas courts was the prevention of stale and fraudulent claims. *Texas Department of Human Resources* v. *Chapman* 570 S.W.2d 46 (Tex. Civ. App. Dallas 1978 Ref. N.R.E.). This purported state interest is not substantial, however, in view of the fact that Tex. Rev. Civ. Stat. Ann. Art. 5535 (1968) tolls all other conceivable statutes of limitations for minors in Texas. Section 13.01 is the only statute of limitations that applies to cut off the rights of a child in any civil suit. Further, Texas common law has traditionally tolled limitations on infants where no minority tolling was provided by statute. *McCrary* v. *City of Odessa* 482 S.W.2d 151 (Tex. 1971). Moreover, there is no limitation barring a presumed father at any time from contesting and disproving his paternity of children born of a marriage. *Davis* v. *Davis* 521 S.W.2d 603 (Tex. 1975). Children thus bastardized and over one year old would have no right to file suit against their real, natural fathers due to Section 13.01.

The significance of the state interest as stated by *Chapman, supra* is further eroded when the unique quality of paternity evidence is considered. This court has recognized the utility of blood tests in paternity suits. *Little* v. *Streater* 49 L.W. 4581 (June 1, 1981). Blood tests as evidence virtually can prove or disprove paternity; such evidence lasts forever, and provides highly objective evidence of who the actual father of a child really is.

B. The one year statute of limitations moreover is not carefully tuned to the purpose of preventing stale or fraudulent paternity claims. Section 13.01 is a blanket and conclusive exclusion of a subclass of illegitimate children. Such a mechanism is overly broad for the purpose it seeks to accomplish; and there is no reason for denying all illegitimate children older than a year even the opportunity to present what might be convincing proof of paternity. This is particularly true in light of the level of reliability of blood test evidence as acknowledged in *Little* v. *Streater, supra* and the tolling under Texas law of all other limitation periods in suits involving minors.

Finally, if a father denies paternity of a child over one year old who was born or conceived during his marriage to the child's mother, Texas laws presume the legitimacy of the child. Family Code Section 12.02(a)(b)(1979). Problems with stale proof in this situation are governed by rules concerning the distribution of the burden of proof. In contrast the situation of an alleged father of an illegitimate child, over one year old, is governed by an absolute bar to the paternity claim. The problems of stale proof, however, are the same in both situations. Section 13.01 acts to bar paternity suits in a fashion which is not rationally related to difficulties of proof and is therefore not carefully tuned to alternative considerations as required by *Lalli* v. *Lalli* 439 U.S. 259 (1978).

C. The limitation period of Section 13.01 is also not "carefully tuned" to alternative state interests. The primary purpose of Chapter 13 Subchapter A is to provide support for

illegitimate children yet such a short time limit defeats this purpose. Further, the state interest of ensuring that child support falls on both natural parents, rather than on the taxpayers of the state, by keeping illegitimate children off the welfare rolls, is substantial yet Section 13.01 frustrates this interest, as well as subordinating the welfare of the children, in an attempt to prevent allegedly stale or fraudulent claims of parentage.

II. Chapter 13 Subchapter A denies illegitimate children the fundamental due process requirement of a meaningful opportunity to have their claims heard. *Armstrong* v. *Manzo*, 380 U.S. 545 (1965). First, the Section 13.01 one year limitation denies illegitimate children a meaningful time in which to present their claims for paternity. This denial of the child's right is coupled with the fact that Subchapter A has no provisions for anyone to bring the suit on behalf of the child affected; neither does the statute afford notice to anyone of the potential loss of rights if the suit is not filed within one year. The denial of notice contravenes the requirement of the due process clause. *Memphis Light, Gas and Water Division* v. *Cratt*, 436 U.S. 1 (1978); *Goldberg* v. *Kelly*, 397 U.S. 290 (1970).

The infant under one year old is obviously without the ability to assert his rights himself. The mother, usually the only other one with a personal interest in establishing paternity, may not be interested in doing so because of her relationship with the father, fear of the father, the social stigma of such a suit, ignorance, confusion or lack of funds. Yet Texas law provides no scheme whereby the mother, or anyone else who might be interested in the welfare of the child, is provided with notice of the one year limitation or of the consequences of the failure to file for paternity within one year. The inability of the child to file a paternity suit himself within one year along with the absence of both a mechanism seeing to it that either a suit will be filed or knowingly not filed and the lack of any notice of the potential loss of rights means that the right to child support is settled, i.e., lost without any realistic opportunity to be heard.

ARGUMENT

I. Introduction

Under Section 14.05(a) of the Texas Family Code, a legitimate child has an ongoing judicially enforceable cause of action for child support until the child reaches 18. Section 12.04 of the Code provides that this right to support exists against both parents. The Texas courts have held that the right to support of a legitimate child lies with the child and may be initiated in court at any time until the child turns 18. *Charvis* v. *Charvis*, 529 S.W.2d 814 (Texas Civil Appeals - Tyler 1975, no writ).

Prior to January 17, 1973, the law in Texas imposed duties on fathers to support legitimate children, but completely denied to illegitimate children that right to support. *Compare, Gully* v. *Gully*, 231 S.W. 97 (Tex. Supp. 1921) with *Home of the Holy Infancy* v. *Kaska*, 397 S.W.2d 208 (Tex. Supp. 1966). In *Gomez* v. *Perez*, 409 U.S. 535 (1973), this Court struck down that scheme as a violation of the Equal Protection Clause of the Fourteenth Amendment. *Gomez* was one of a series of equal protection decisions by this Court that have removed illegitimate children from the medieval legal nether world they previously inhabited for centuries. In *Gomez* the Court held:

> Once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers, there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother. (409 U.S. at 538)

Implicit in *Gomez* was the notion that the state must accord to an illegitimate child a right to institute a judicial proceeding for the purpose of proving the identity of a biological father in order to obtain a judicially enforceable support right otherwise accorded to legitimate children generally.

The statute at issue in this case — Texas Family Code Section 13.01 (1975) — is Texas' belated, grudging, and unconstitutional response to the *Gomez* mandate. Texas Family

Code Chapter 13 provides the only method whereby an illegitimate child may establish paternity and receive child support. Section 13.01 requires that any lawsuit to establish paternity must be filed before the illegitimate child is one year old or any suit is forever barred.

The history of Texas' response to *Gomez* is described fully in *Texas Department of Human Resources* v. *Hernandez*, 595 S.W.2d 189 (Tex. Civ. App.-Corpus Christi 1980 Ref. N.R.E.):

> After *Gomez* the legislature enacted Title 2 of the Family Code governing the parent-child relationship. Tex. Laws 1973, ch. 543 at 1411. Understandably, in drafting Title 2, the legislature considered comprehensive provisions regulating the legal aspects of children born out of wedlock. Despite the *Gomez* decision, however, such comprehensive provisions were not passed. Instead, the legislative "response" to *Gomez* was found in Chapter 13 of the Family Code which provided for voluntary legitimization proceedings. Smith, Commentary on Title 2 of the Family Code, 5 *Tex. Tech. L. Rev.* 389, 418 (1974). It was later held, however, that when the legislature provided judicial relief against the father on behalf of a legitimate child for support, due to *Gomez* it necessarily provided the same relief on behalf of an illegitimate child. In the Interest of R____ V____ M____, 530 S.W.2d 921 (Tex. Civ. App. — Waco 1975, no writ). Thus, after the effective date of Title 2, which was January 1, 1974, illegitimate children had judicially enforceable support rights, whether by common law or by statute, against their biological fathers. *Gomez*, supra; *Wynn*, supra; In the Interest of R____ V____ M____, supra.
>
> Remaining in a state of flux, the statutory rights of illegitimates were brought into sharper focus by amendments to Chapter 13 of Title 2 of the Family Code, the effective date of which was September 1, 1975. The result was the present involuntary legitimation proceeding found in Sections 13.01 through 13.09 of the Family Code.
>
> * * *
>
> Section 13.01 of the Family Code, . . . requires that paternity suits be filed at least one year from the birth of the child . . .

Thus while the Texas legislature failed to act, the courts brought Texas into compliance with *Gomez* and its requirement that the state extend the same judicially enforceable support rights to illegitimate children as to legitimate children. After a two year period during which illegitimate children were accorded the same constitutionally adequate equal rights to support that legitimate children had,[2] cause of action at any time during childhood, the Texas legislature substantially reduced the rights resulting from *Gomez*. The one year statute of limitations is a grudging and wholly inadequate implementation of the *Gomez* holding and principles and is best understood as continuing the discrimination that historically has been directed toward illegitimate children and that this Court consistently has condemned. This Court has voiced that condemnation through application of an enhanced standard of equal protection applied to discrimination against illegitimate children.

In *Mathews* v. *Lucas*, 427 U.S. 495 (1976) the Court held that discrimination against illegitimate children is not subject to an equal protection "strict scrutiny" test, but also made clear that normal "rational basis" equal protection review is inappropriate. Rather, the Court articulated a form of heightened scrutiny review applicable to discrimination on the basis of illegitimacy. The opinion emphasized that the standard of review applied is "not a toothless one." *Mathews* v. *Lucas* 427 U.S. 495, 510 (1976).

The Court in *Lucas* relied on a perception of the disfavored status of illegitimacy and the resulting discrimination and reaffirmed *Weber* v. *Aetna Casualty & Surety Company*, 406 U.S. 164 (1972); *Gomez* v. *Perez*, 409 U.S. 535 (1973); and

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[2] In *Alvarado* v. *Gonzalez*, 552 S.W.2d 539 (Tex. Civ. App. — Corpus Christi 1977, no writ) the court held that illegitimate children born prior to September 1, 1975 could file paternity suits until they reached 18 years of age. Only children born on or after September 1, 1975 were bound by the one year statute of limitations of Section 13.01.

Jimenez v. *Weinberger*, 417 U.S. 628 (1974), all of which subjected classifications based on illegitimacy to rigorous scrutiny, and found them to offend the Equal Protection Clause.

The statute in *Lucas* survived rigorous review because it granted benefits to illegitimate children who met any of several alternative criteria for entitlement, covering almost all conceivable sub-classes; the scheme was based on "reasonable empirical judgments that [were] consistent with a design to qualify entitlement" and accorded illegitimate children a full opportunity to present relevant evidence. [427 U.S. at 510]. "[T]he statute [in *Lucas* did] not broadly discriminate between legitimates and illegitimates without more, but [was] carefully tuned to alternative considerations." [427 U.S. at 513]. The Court reaffirmed its previous statements that ". . . the legal status of illegitimacy, however defined, is like race or national origin, a characteristic determined by causes not within the control of the illegitimate individual, and it bears no relation to the individual's ability to participate in and contribute to society," and that imposing disabilities on innocent children simply because of their birth status remains "illogical and unjust." *Lucas*, [427 U.S. at 505].

In *Trimble* v. *Gordon*, 430 U.S. 762, 767 (1977), the Court noted that "illegitimacy is analogous in many respects to the personal characteristics that have been held to be suspect when used as the basis of statutory differentiations [but] the analogy was not sufficient to require 'our most exacting scrutiny.'" Nevertheless, "[i]n a case like this, the Equal Protection Clause requires more than the mere incantation of a proper state purpose." [430 U.S. at 769.]

Lalli v. *Lalli*, 439 U.S. 259, 265 (1978) similarly held that classifications based on illegitimacy "are not subject to 'strict scrutiny,' [but] they nevertheless are invalid under the Fourteenth Amendment if they are not substantially related to permissible state interests." Thus, "a statute placing exceptional burdens on illegitimate children in the furtherance of proper state objectives must be more 'carefully tuned to alternative considerations.'" *Lalli*, *supra*, 439 U.S. at 266, quoting *Trim-*

ble v. *Gordon, supra,* and *Mathews* v. *Lucas, supra.* Further, the relation of the statutory discrimination to state interests must be "*evident and substantial.*" *Lalli, supra* 439 U.S. at 268. (Emphasis added).

In sum, the Court has upheld statutory classifications discriminating against illegitimate children only "[i]n cases where statutory classifications affecting illegitimates are so *precisely structured* as to further a *sufficiently adequate* state interest . . ." *Parham* v. *Hughes,* 441 U.S. 347, 352 n.5 (1979). (Emphasis added.)

Texas' grudging response to *Gomez* is best understood as an outgrowth of the very factors that have led this Court to apply heightened scrutiny to discrimination against illegitimate children. Such discrimination "is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing . . . [P]enalizing the illegitimate child is an ineffectual — as well as unjust — way of deterring the parent." *Weber* v. *Aetna Casualty & Surety Co.,* 406 U.S. 164, 175 (1972). This Court has always subjected to special scrutiny invidious discrimination against groups on the basis of the conditions of their birth or ancestry. *See, e.g., Loving* v. *Virginia,* 388 U.S. 1 (1967); *In re Griffiths,* 413 U.S. 717 (1973); *Oyama* v. *California,* 332 U.S. 633 (1945); *Hirabayashi* v. *U.S.,* 320 U.S. 81, 100 (1942).[3]

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[3] See also *Regents of the University of California* v. *Bakke,* 438 U.S. 265 (1978), *Frontier* v. *Richardson* 411 U.S. 677 (1973). One hundred years ago this Court recognized that the Constitutional prohibition against Forfeitures of the Blood was a reaction to the "rank injustice" when "innocent children were made to suffer because of the offense of their ancestor." *Wallach* v. *Van Riswick,* 92 U.S. 202, 210 (1875). Discrimination against illegitimate children has been compared to attaching "an archaic corruption of the blood, a form of bill of attainder," *King* v. *Smith,* 392 U.S. 309, 336 n.5 (1968), Douglas, J., concurring, and with a "badge of ignobility," violating Art. 1, § 9, Clause 8 of the Constitution, *Eskra* v. *Morton,* 524 F.2d 9, 13 n.8 (7th Cir. 1975).

Like other statutes that have received heightened judicial solicitude, illegitimacy subjects a child to "a stigma of inferiority and a badge of opprobrium." Note, *Developments in the Law of Equal Protection*, 82 *Harv. L.Rev.* 1065, 1127 (1969). As this Court stated in *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 175-76 (1972):

> The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. ***Courts are powerless to prevent the *social opprobrium suffered by these hapless children*, but the Equal Protection Clause does enable us to strike down discriminatory laws relating to *status of birth* where — as in this case — the classification is justified by no legitimate state interest, compelling or otherwise. (Emphasis added.)

See also, Jimenez v. *Weinberger*, 417 U.S. 628, 632 (1974); Krause, *Illegitimacy, Law and Social Policy* (1971); Krause; "Equal Protection for the Illegitimate," 65 *Mich. L.Rev.* 477 (1967).[4]

Heightened scrutiny thus has been found necessary and appropriate by this Court in enforcing the Equal Protection

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[4] When children are stigmatized because of a condition of their birth, the stigma generates a feeling of inferiority that may inflict long-term damage, as this Court recognized in *Brown* v. *Board of Education*, 347 U.S. 483, 494 (1954). Legal reinforcement of the stigma should be scrutinized with particular care.

> To give the illegitimate child an inferior status because, through no fault of his own, his parents were never joined in an easily dissolved union is a hypocrisy which can only frustrate and alienate him from the society which created his inferiority.

Marcus, "Equal Protection: The Custody of the Illegitimate Child," 11 *Journal of Family Law* 1, 17-18 (1971). Illegitimate children become increasingly aware of their socially inferior status, and show differences in "adjustment, as well as lower IQ; the differences increase with age." Jenkins, "An Experimental Study of the Relationship of Legitimate and Illegitimate Birth Status to School and Personal and Social Adjustment of Negro Children," 64 *American Journal of Sociology* 196 (1958).

Clause on behalf of these children who have suffered "through the ages society's 'illogical and unjust' condemnation," *Weber, supra,* 406 U.S. at 175.

II. Section 13.01 of the Texas Family Code Denies Illegitimate Children Equal Protection of the Laws.

Texas invidiously discriminates against illegitimate children over one year of age by denying them the means ever to obtain child support when child support is obtainable by legitimate children generally and regardless of age at the commencement of proceedings. The one-year limitation of Section 13.01 of the Family Code violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, because it denies equal support rights to illegitimate children over one year of age, without any rational much less substantial relationship to any legitimate state interest. It violates the basic principle that "a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally." *Gomez* v. *Perez,* 409 U.S. 535, 538, (1973).

Lois Mae Mills and the Texas Department of Human Resources originally filed this suit on behalf of Archie Burton Duncan. The lawsuit was an attempt to obtain child support for Archie Burton Duncan by establishing paternity, as required by Chapter 13 Subchapter A of the Texas Family Code.

The Texas Department of Human Resources was a plaintiff because of the requirements of federal statutes regarding paternity determination and child support collection for children receiving welfare benfits. Under the Aid to Families with Dependent Children statute, Ms. Mills as an applicant or recipient of benefits was required to "cooperate with the State (i) in establishing the paternity of a child born out of wedlock with respect to whom aid is claimed, and (ii) in obtaining support payments for such applicant and a child with respect to whom such aid is claimed . . ." 42 U.S.C. § 602(a)(26)(B). The mother receiving AFDC must also "assign the State any rights" to child support. 42 U.S.C. § 602(a)(26)(A). The *state*

then must "undertake (A) in the case of a child born out of wedlock with respect to whom an assignment under Section 602(a)(26) of this title is effective, to establish the paternity of such child . . . and (B) . . . to secure support for such child from his parent . . ." 42 U.S.C. § 654(4). The state paternity/child support collection services must also be made available to non-welfare recipients. 42 U.S.C. § 654(6).[5] The statute was a product of the Senate Finance Committee's concerns that welfare costs be decreased *and* that each child have a right to support, inheritance and to know who his or her father is:

> The committee believes that an AFDC child has a right to have its paternity ascertained in a fair and efficient manner. Although this may in some cases conflict with the mother's short-term interests, the committee feels that the child's right to support, inheritance, and his right to know who his father is deserves the higher social priority.

Senate Report No. 93-1356, — reprinted in [1974] U.S. Code Cong. & Admin. News 8133, 8155, 8156.

This Court has also recognized that the "right . . . to needed support from . . . fathers [is] an essential right." *Gomez* v. *Perez*, 409 U.S. 535, 538. Food, clothing, shelter and education are basic needs for the child that are provided either through parental support or public welfare.

> It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. *Prince* v. *Massachusetts*, 321 U.S. 158, 166 (1944); *Quilloin* v. *Walcott*, 434 U.S. 246, 254 (1978).

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[5] The Texas statute raises some question, not presented in this case of whether a state paternity statute of limitations is pre-empted by the federal law, at least with regard to welfare recipients. *See, Jones* v. *Rath Packing*, 430 U.S. 519, (1977) (state law pre-empted where federal "goal cannot be accomplished"); *Hines* v. *Davidowitz*, 312 U.S. 52, 70 (1940) (state law pre-empted where it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"); *Perez* v. *Campbell*, 402 U.S. 637 (1971).

Texas provides to legitimate children an enforceable right to receive essential child support. A legitimate child, under Sections 12.04 and 14.05 of the Family Code, has the right to an ongoing duty of support by both parents until the child reaches 18 (and in some situations beyond).[6] Further, Texas courts have held that this right lies with the child, and may be instituted at any time until the child reaches 18 or is otherwise emancipated under Texas law. *Charvis* v. *Charvis*, 529 S.W.2d 814 (Texas Civil Appeals — Tyler 1975, no writ).[7] Failure to toll statutes of limitation only in contested paternity cases is invidious discrimination.

On the other hand, the child support right for illegitimate children under Texas law is grossly truncated. Paternity suits under Chapter 13 are a prerequisite to an illegitimate child's ability to receive from its natural father. *Texas Department of Human Resources* v. *Delley*, 581 S.W.2d 519 (Texas Civil Appeals Dallas 1979, writ ref. N.R.E.). The claim for child support, through the paternity action, thus must be brought within one year of the illegitimate child's birth.[8]

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[6] Under Texas Family Code Section 14.05(b)(1979) if the court finds that the child, whether institutionalized or not, requires continuous care and personal supervision because of a mental or physical disability and will not be able to support himself, the court may order that payments for the support of the child shall be continued after the 18th birthday and extended for an indefinite period.

[7] With the exception of the statute at issue in this case, all statutes of limitations are tolled during minority by Texas law. Tex. Rev. Civ. Stat. Ann. Art. 5535 (1968). Further, it has been a long standing proposition of Texas Jurisdiction that statutes of limitation do not run against an infant, *Lacy* v. *Williams*, 8 Texas 182 (1852). In fact, Texas courts have applied this state common law rule to toll statutes of limitation where no minority tolling provision had been provided by law. *McCrary* v. *City of Odessa*, 482 S.W.2d 151 (Texas 1971) and *Latcholia* v. *Texas Employers Association*, 167 S.W.2d 164 (Comm. of App. Sec. A 1942).

[8] The sole method of proving paternity, in Texas courts, other than by agreement of the parties, is through a suit brought pursuant to the provisions of Chapter 13, Subchapter A of the Family Code. Section

Thus, Texas has ignored the holding of *Gomez* that "[o]nce a State posits a judicially enforceable right on behalf of children who need support from their natural fathers, there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother." *Gomez* v. *Perez* 409 U.S. 535, 539 (1973). Archie Duncan has been denied the opportunity to obtain a judicially enforceable right of needed support at the same time in his life that other, legitimate children retain that opportunity. Such a distinction between illegitimate and legitimate children bears no rational relationship to any legitimate state interest, much less does it meet the heightened standard of review applied in the illegitimacy cases discussed *supra* at pp. 11-12.

III. The Invidious Discrimination Can Not Be Justified By Alleged Concern Regarding Fraudulent Or Stale Claims

A. The Texas courts have alluded to only one governmental interest as a putative justification for the one-year statute of limitations: the prevention of stale or fraudulent claims and the trial cases while the evidence is fresh. *Texas Department of Human Resources* v. *Chapman*, 570 S.W.2d 46 (Tex. Civ. App. Dallas 1978 Ref. N.R.E.).[9] The blanket one

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4(a) of Senate Bill No. 168, Acts of the 63rd Legislature, Regular Session 1973, provides that when the act takes effect on January 1, 1974, it (Chapter 13) governs all proceedings, orders, judgments and decrees in suits brought after it takes effect.

[9]The other rationale often asserted for discrimination against illegitimate children — protecting and strenghtening family life — has been rejected definitively by this Court as a legitimate or sufficient state interest for denying benefits or rights to innocent illegitimate children. "The basic rationale of [the Court's illegitimacy] decisions is that it is unjust and ineffective for society to express its condemnation of procreation outside the marital relationship by punishing the illegitimate child who is in no way responsible for his situation and is unable to change it." *Parham* v. *Hughes*, 441 U.S. 347, 352 (1979). *See also, Trimble* v. *Gordon*, 430 U.S. 762, 770-71;

year-limitation is hardly "carefully tuned" to achieve this purpose. The purported state interest is not "sufficiently adequate" nor is the one-year statute of limitations sufficiently "precisely structured" to permit the discrimination to withstand constitutional scrutiny. *Parham* v. *Hughes*, 441 U.S. 347, 352 (1979).

This Court has not tolerated general and over-inclusive prophylactic rules which broadly discriminate against illegitimate children because of problems of proving paternity. As stated in *Gomez* v. *Perz*, 409 U.S. 535, 538, itself:

> We recognize the lurking problems with respect to proof of paternity. Those problems are not to be lightly brushed aside, but neither can they be made into an impenetrable barrier that works to shield otherwise invidious discrimination. *Stanley* v. *Illinois*, 405 U.S. 645, 656-657 (1972); *Carrington* v. *Rush*, 380 U.S. 89 (1965).

In *Stanley* v. *Illinois*, 405 U.S. 645, 656-57 (1972), the Court said:

> The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. ***Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issue . . ., when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.

The decisions in the illegitimacy cases thus establish that the Court is not unmindful that determination of paternity occasionally presents a problem of proof, and that the Court will give limited deference to the government's method of

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N.J.W.R.O. v. *Cahill*, 411 U.S. 619, 621 (1973); *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972) ("illogical and unjust"); *Glona* v. *American Guarantee & Liability Insurance Co.*, 391 U.S. 72, 75 (1968).

determining the validity of an individual claim so long as the claim can be presented on an equal basis by illegitimate children. The opinions also establish, however, that the problems of proof connected with paternity do not mean that a "blanket and conclusive exclusion of a subclass of illegitimates is reasonably related to the prevention of spurious claims." *Jimenez* v. *Weinberger*, 417 U.S. 628, 636 (1974). *See also*, *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 1975 (1972).[10]

This is particulary true when — as in paternity/support cases in contrast to intestacy cases — the putative father is alive and can defend against the claim.

> Accuracy is enhanced by placing paternity disputes in a judicial forum during the lifetime of the father. As the New York Court of Appeals observed in its first opinion in this case, the "availability [of the putative father] should be a substantial factor contributing to the reliability of the fact-finding process." *In re Lalli*, 38 N.Y. 2d at 82, 340 N.E.2d at 724. In addition, requiring that the order be issued during the father's lifetime permits a man to defend his reputation against "unjust accusations in paternity claims," which was a secondary purpose of § 4-1.2. Commission Report 266.
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> Fraudulent assertions of paternity will be much less likely to succeed, or even to arise where the proof is put before a court of law at a time when the putative father is available to respond, rather than first brought to light when the distribution of the assets of an estate is in the offing.

Lalli v. *Lalli*, 439 U.S. 259, 271-72 (1978).[11]

B. A one-year limitation might be seen as a means of eliminating cases in which innocent men are forced to defend

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[10] If some sub-groups of illegitimate children present disproportionate proof problems, then the legislative remedies must "meet the cases presenting those problems without arbitrarily exterminating those which do not." *Miller* v. *Laird*, 349 F.Supp. 1034, 1046 (D.D.C. 1972) (three-judge court).

[11] The other elements unique to probate proceedings — problems of notice to unknown claimants and the state's strong interest in fi-

against assertions of paternity when the quality of proof has been diminished by the passage of time. On closer examination, however, the limitation can not be seen as an appropriate mechanism for ensuring the quality of proof in support actions. It is the burden of proof, not a statute of limitations, that ensures that innocent men are not forced wrongfully to provide support. There is no reason for denying even the opportunity to present what might be, in any given case, compelling and convincing proof of paternity.

> Opening the courts to suits of this kind may conceivably be a temptation to some to assert motherhood fraudulently. That problem, however, concerns burden of proof. Where the claimant is plainly the mother, the state denies equal protection of the laws to withhold relief merely because the child, wrongfully killed, was born to her out of wedlock. *Glona* v. *American Guarantee & Liability Insurance Co.*, 391 U.S. 72, 76 (1968).

The absence of a parallel statute of limitations in paternity disputes involving legitimate children demonstrates that the one-year limitation does not reasonably serve the purpose of assuring the quality of proof in support actions. A legitimate child may bring an action for support at any time during his minority. if the husband of the legitimate child's mother denies paternity, he may find it difficult to produce evidence that he did not have intercourse with the mother at the time of conception. The passage of time affects such a putative father as much as it would affect the putative father of an illegitimate child, and the nature of the evidence at issue when a husband denies paternity of a child born during his marriage is no different from that in actions for support by illegitimate children. See, *Note,* "Presumption of Legitimacy — Proof Necessary to Rebut Presumption," 41 *Chi. Kent L.Rev.* 136 (1964). yet there is no limitation on the *legitimate* child's right

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nality of property transfers after death, *Lalli* v. *Lalli,* 439 U.S. at 270, are also not present in paternity proceedings during the father's lifetime. *See, Lalli* v. *Lalli,* 439 U.S. at 268 n.6 and accompanying text.

to support, even though that child's paternity can be brought into issue and disproved by the presumed father at any time. *Davis* v. *Davis*, 521 S.W.2d 603 (Texas 1975), *Furlow* v. *Harris County Child Welare Unit*, 527 S.W.2d 802 (Tex. Civ. App. — Houston [1st District] 1975, no writ). There is an evidentiary presumption, that a child born or conceived during wedlock is legitimate as to the husband of its mother in contrast, the situation of the putative father denying paternity of the illegitimate child is governed by an absolute bar to the claim, a bar that the state seeks to justify by alluding to "stale proof" problems that are present in both situations.

The Texas statute acts to bar or permit an action for support without regard to difficulties of proof. The rational and usual way in which courts deal with "spurious" claims is through rules relating to the burden of proof and the admissibility of evidence. See, *Krause*, "Legitimate and Illegitimate Offspring of *Levy* v. *Louisiana* — First Decisions on Equal Protection and Paternity," 36 *U. Chi. L.Rev.* 338, 349-53 (1969). The state's interest in protecting innocent men from spurious claims does not justify the severe restriction that Texas has placed upon illegitimate children.[12]

The claim for current and future child support is not, moreover, a "stale" claim in the normal sense of a cause of action for lump-sum liability which is terminated by a statute of limitations.[13] Under Texas law, child support is an ongoing right

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[12] The putative father is also given other protection pursuant to the Texas Family Code. Venue for the paternity suit lies in the county of the alledged father's residency. Section 13.41. The possibility of the use of the suit for blackmail or extortion are reduced because Section 11.08(c) makes the suit confidential. Finally Section 13.02(b) requires the trial court to dismiss the lawsuit if the mother refuses to submit to blood tests as required by Section 13.02(a).

[13] Since the issue in this case is the technical barrier Texas has raised to actions for future child support for the illegitimate child, it is unnecessary for the Court to reach the issue of whether, if the paternity statute of limitations is held unconstitutional, the child has

and the amount can be adjusted continuously. As the Florida Supreme Court said the four-year Florida statute of limitations for paternity actions, violative of the Equal Protection Clause:

> The state's objective to avoid stale claims, however, is not valid justification for the discrimination it inflicts on illegitimates since their right to support is a continuing right renewing itself until the child becomes eighteen. *An action to determine paternity is not a stale claim when employed as a prerequisite to an illegitimate's obtaining of continuing, recurring support. This right has never become dormant, and for the statute of limitations to act to preclude this right on the basis that it is stale is illogical.*
>
> *Furthermore, this statute bears at best a tenuous relationship to the interest it seeks to advance of ensuring the availability of adequate proof of paternity.* The arbitrary determination that paternity can only be proved in four years creates impenetrable barrier to an illegitimate child's right to seek support without considering alternatives which deal directly with the problem of proof.
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> We also note that competing and conflicting state interests are activated when this statute of limitations is employed to preclude paternity suits. The state wants to avoid stale and fraudulent or spurious claims against a purported father, but it also wants children to be maintained from the resources of their natural parents so that the burden on the public welfare system, and thus the taxpayers will be lessened.
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> The only proper application of the statute of limitations to child support claims would be to those claims that have accrued in the past but which are not adjudicated. The state could properly say that a claim for child support not made within a certain time after it accrued is barred. However, since the duty of support continues throughout the minority of the child, new causes of action are being

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a right to back child support when the paternity proceeding is commenced after one year. Texas Family Code Section 13.42(a) provides that the alleged father who denies paternity may not be required to pay any child support until after paternity has been established.

> created each day that the natural father does not provide support. This duty of future support cannot be barred for illegitimate children if it is allowed for legitimate children.

State of Florida, Department of Health and Rehabilitative Services v. *West*, 378 So.2d 1220 (1979).[14] (Emphasis added).

In this context, the one-year time limit can best be understood as an attempt by an overwhelmingly male legislature, to limit the rights decreed by *Gomez*, out of a continuing desire to blame only the child and the mother for illegitimacy[15] and to limit the claims of illegitimate children against their fathers. For Texas to create a cause of action whom *Gomez* commands for Texas to create a cause of action in the mother, and then terminates that right of action when she delays beyond the one-year period, is inconsistent with the holding in *Gomez*. Such a delay by the mother constitutionally may justify terminating the mother's right to have the natural father contribute to the child's support; it cannot be grounds for terminating the *child's* right to support.

After the court ruled in Gomez, Texas did not establish a right to support *for the child* born out of wedlock. It created for the mother of such child an action for contribution by the father to their joint and several liability for the support of the

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[14] *See also, Stringer* v. *Dudoich*, 583 P.2d 462 (N.M. 1978) *Palmer* v. *Mangum*, 338 So.2d 1002 (Miss. 1976), *Huss* v. *DeMott* 524 P.2d 743 (Kan. 1974), *Kaus* v. *Sing Chawla*, 522 P.2d 1198 (Wash. Ct. App. 1974) all of which hold that limitations on paternity suits or child support suits by illegitimates are unconstitutional in their entirety or as they apply to illegtimate children.

[15] Historically mothers of illegitimate children have borne a greatly disproportionate share, compared to the fathers, of the stigma, condemnation, and punishment for parenting an illegitimate child, as well as of the obligation to support and nurture the child. See Vincent, "Teenage Unwed Mothers in American Society," XXII, No. 2 *The Journal of Social Issues* 22, 30-31 (April 1966); Krause, "Equal Protection for the Illegitimate," 65 *Mich. L.Rev.* 477 (1967); Secretary of the United Nations, *Report:* "The Status of the Unmarried Mother: Law and Practice" 56 (1971).

child. While the mother of an illegitimate child frequently has an obvious financial interest in obtaining support from the natural father, her interest is not necessarily co-extensive with the child's. The mother may delay prosecution when the father openly admits paternity and voluntarily provides support. It is understandable why she would hesitate to jeopardize their relationship and antagonize the father by bringing him into court. It is understandable, that is, from the mother's point of view. It is not, however, reasonable in terms of the child's interest and the constitutional mandate of *Gomez*[16] that illegitimate children themselves have the same rights to support from their fathers as legitimate children.

A child under one year of age is under an obvious disability and is unable to seek to have the required action initiated on his own behalf, as the Texas Supreme Court has otherwise recognized. *McCrary* v. *City of Odessa*, 482 S.W.2d 151 (Texas 1972). In those situations where the state is not the plaintiff, an illegitimate child's right to a paternity determination and support effectively is tied to the willingness and ability of the mother to assert those rights.[17] If the mother is unwilling or unable to pursue a paternity suit within one year, or fails to do so out of ignorance of the law, then the child's rights to sup-

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[16] While Texas ignores the child's right at the threshold of the action, ironically it has assured that once a suit is filed the child's interests are protected in case of conflict with the mother's interests:

> "The child must be a party to a settlement agreement with the alleged father. The child shall be represented in the settlement agreement by a guardian ad litem appointed by the court. The court must approve any settlement agreement, dismissal, or nonsuit." Section 13.07.

This recognition of conflicting interests is constitutionally inadequate because if the suit is barred by the one year statute, 13.07 provides no protection to an illegitimate child.

[17] While other persons may also bring suit on behalf of the illegitimate child pursuant to Texas Family Code, Section 11.03, if they have an interest in the child, it is uncommon for anyone other than the mother to bring suit unless the mother is receiving welfare benefits.

port vanish. In many cases the mother herself is a minor, who from ignorance or confusion or because of parental pressure will not bring suit. Most women, but particularly mothers who themselves are minors, will fear community disapproval or ostracism resulting from the public exposure of litigation and may therefore postpone a lawsuit. In some cases the interests of the mother do not coincide with those of the child, because the mother may be afraid that a paternity suit would alienate the father's affections. The mother may be lulled into inaction because she and the father are cohabitating and pooling their resources,[18] or because the father is supporting the child voluntarily. In either situation, the mother's incentive to sue is diminished, if not eliminated; but neither cohabitation or voluntary support tolls the statute of limitations at issue here. *Texas Department of Human Resources* v. *Hernandez*, 595 S.W.2d 189 (Tex. Civ. App. — Corpus Christi 1980 Ref. N.R.E.).

In other circumstances, the child may be living with the father alone during the first year(s) of the child's life,[19] and if the father then abandons the child, the child is left without a remedy.

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[18] Parents of illegitimate children often have long and stable relationships. *See, Herzog*, "Some Notes About Unmarried Fathers," 45 *Child Welfare* 194 (April 1966); Wessel, "A Physician Looks at Services for Unmarried Parents," 49 *Social Casework* 11 (1968); Chaskel, "Changing Patterns of Services for Unmarried Parents," 49 *Social Casework* 3 (1968); Sauber and Rubenstein, *Experiences of the Unwed Mother as a Parent* (1965); Pannor, Massarik & Evans, *The Unmarried Father* (1971); H. Pope; "Unmarried Mothers and Their Sex Partners," *Journal of Marriage and the Family* 555 (August, 1967).

[19] A significant percentage of illegitimate children live with their fathers rather than their mothers. U.S. Bureau of the Census, *U.S. Census of the Population 1970 — Vol. 1, Characteristics of the Population, Part 1 U.S. Summary — Section 2*, U.S. Government Printing Office, Washington, D.C. 1973, Table 206.

Frequently, the mother has insufficient resources during the first year of the child's life to prosecute a paternity/support action. She may be particularly reluctant to expend scarce resources on such a proceeding if the chance of getting any significant support is minimal because the father is indigent or very young or wholly unreliable.

A disproportionate number of illegitimate births occur to poor mothers. In 1973, 13.2 percent of all births were illegitimate. In the same year, 32.7 percent of the children receiving Aid to Families With Dependent Children (AFDC) were illegitimate. U.S. Printing Office, *Wage Garnishment, Attachment, and Establishment of Paternity,* Senate Committee on Finance, pp. 215-16 (1975). A significant proportion of other mothers of illegitimate children have low-incomes but are not receiving AFDC. Such women are not in a financial position to afford counsel to assert the children's rights. This is especially true during the children's first year because the woman may have incurred the medical expenses or loss or reduction of income as a result of the birth of the child.

Moreover, there may be compelling reasons for a woman not to commence a paternity action. Congress has in fact recognized that the mother has a right not to bring or cooperate with a paternity/support proceeding where there is "good cause." 42 U.S.C. § 602(a)(26)(B). Federal regulations recognize as good cause for the mother's failure to participate in establishing paternity and securing support when such participation reasonably can be anticipated to result in serious physical or emotional harm to the child or the mother. 45 C.F.R. § 232.42(a)(1). Federal law also recognizes that good cause for not bringing the action at one point in time may not exist at a later date and requires that a decision not to proceed with the paternity/support action be reviewed periodically at each redetermination of her welfare eligibility. 45 C.F.R. § 232.47.[20]

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[20] Good cause for non-cooperation suspends paternity/support proceedings unless the state determines that *it* can proceed without the mother's help and without endangering the mother or child. 45 C.F.R. § 232.49.

C. The discrimination and patent irrationality of the one-year statute of limitations are manifest in the "unique" evidentiary nature of paternity proceedings. *Little* v. *Streater*, U.S. ____, (1981) 49 L.W. 4581, 4583 (June 1, 1981). The function of a statute of limitations includes avoidance of situations in which testimony deteriorates over time as memories fade or documents disappear. Paternity proceeding are unique in every such proceeding does not deteriorate over time.[21] "Unlike other evidence that may be susceptible to varying interpretation or disparagement, blood test results, if obtained under proper conditions by qualified experts, are difficult to refute." *Little* v. *Streater*, 49 L.W. at 4583. Congress has recognized that in the ascertainment of paternity, the reliability of blood and unrelated tests is extremely high, contrary to many popular misconceptions. Sen.R. 93-1356 reprinted in [1974] U.S. Code Cong. and Admin. News 8155-56. The Senate Finance Committee stated:

> In taking the position that a child born out of wedlock has a right to have its paternity ascertained in a fair and efficient manner, the [C]ommittee acknowledges that legislation must recognize the interest primarily at stake in the paternity action to be that of the child . . . The Committee is convinced that . . . paternity can be ascertained with reasonable assurance, particularly through the use of scientifically conducted blood typing. S.Rep. No. 93-1356, 93d Cong., 2d Sess. 52 (1974), quoted in *Little* v. *Streater*, 49 L.W. at 4585 n.9.

In *Little* v. *Streater*, 49 L.W. at 4583, this Court also noted the joint American Medical Association — American Bar Association 1976 Guidelines recommending the use of a set of seven blood test "systems" that are "reasonable" in cost and provide a 91% cumulative probability of negating paternity for erroneously accused Black and 93% for Caucasian men. See also, "Using Blood Tests to Establish Paternity," Center for

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[21] Paternity proceedings are also unique in that the two crucial witnesses are either parties to the suit or required witnesses.

Policy Research, Inc., Office of Child Support Enforcement, D.H.E.W. Report, 1977.

Even the AMA-ABA Guidelines understate the quality of exclusion achievable by modern blood testing and genetic testing. Under the current state of the art, tests are available which will exclude up to 99% of all possible non-fathers. "Resolution by HLA Testing of 1,000 paternity cases not excluded by ABO Testing," Paul I. Terasaki, 16 *Journal of Family Law* 543 (1978); "Paternity Testing: A Current Approach," Michael B. Stroud, et al., *Trial*, September 1980, 46.

Current tests not only reflect exclusion with very high probabilities of accuracy, but also can reflect that the claim of paternity is correct with similarly great accuracy. Human Leukocyte Antigen ("HLA") testing is the testing of antigens on white blood cells. The presence or absence of certain antigens is genetically controlled. Since a child receives one-half of his genes from its mother and the other half from its natural or biological father, the child's genetic makeup must match, in part, the genetic makeup of the true father. HLA testing can determine this genetic makeup.

The patterns of genetic makeup that are obtained from the alleged father and illegitimate child are then evaluated utilizing well-defined laws of inheritance to establish whether or not the genetic makeup of the alleged father would preclude his being the true father of the child in question. If the genetic makeup of each does not in part match, then the alleged father is completely excluded as being the possible father of the illegitimate child. With HLA testing the exclusion rate is routinely 95-98 percent, *Stroud, supra* at 46, and can be higher.

> [Of the nonexclusion cases] 67% had a probability of paternity of more than 95% and 86% were greater than 90% probability of paternity. As many as 16% of the cases tested had probabilities greater than 99% . . . Thus, *when a given putative father is not excluded, the unique feature of HLA testing is that such nonexcluded males can be assigned a high probability of paternity.* (Emphasis added.)

"Resolution by HLA Testing of 1,000 paternity cases not excluded by ABO Testing" Paul I. Terasaki, 16 *Journal of*

Family Law 543 (1978). *See also,* Krause, *Illegitimacy, Law and Social Policy,* at pp. 123-28, 138; Keiter, "Advances in Anthropological Paternity Testing," 21 *Am. J. Phys. Anthropology* 81 (1963)(99.73 plus probability in 19 out of 20 cases).

The interests of the state, and those of the alleged father, to prevent incorrect claims of paternity are thus protected by the recent advance in blood and genetic testing. Modern tests virtually are capable of proving and disproving paternity; such evidence lasts forever, and in contrast to the subjective evidence upon which paternity has been proven in the past, such tests provide highly objective scientific evidence of who the actual, biological father is, or exclude 95%-100%[22] of the falsely accused fathers.

Texas, in the same law that created the one-year statute of limitations, recognized the central role of blood tests in paternity cases. The court is required to order blood tests for the mother, father and child, Section 13.02(a); to appoint experts to make such tests, Section 13.03(a); and to require fees to be paid by the state welfare department if it is a party, Section 13.03(b). The results of the tests alone can be a basis for dismissal of a paternity action, Section 13.05(a), and are otherwise admissible at trial, Section 13.06.

D. Finally the limitation period of Section 13.01 is not "carefully tuned," to alternative state interests, interests that *Mathews* v. *Lucas* 427 U.S. 495 (1976) and *Lalli* v. *Lalli* 439 U.S. 259 (1978) stated must be recognized. The Texas Family Code, Sections 14.05, 12.05(3), and Chapter 13 are all directed at providing support to dependent children. Yet Section 13.01 by its limitation defeats this purpose for illegitimate children after they reach the age of one year. The primary purpose of Chapter 13 Subchapter A is to provide support for illegitimate children, yet the time limit of § 13.01 is not directed

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[22] Dr. Terasaki states that 100% exclusion rates are now possible by testing very rare antigens but that the expense of such tests are currently prohibitive. Terisaki 16 *Journal of Family Law* pg. 545 supra.

to this purpose. This provision terminates the child's rights based merely on the passage of a certain amount of time and has no logical connections with who is the actual father, the availability of proof of paternity, or the needs of the child.

Second, the state has the interest in ensuring that the primary obligation for the support of a child falls on both natural parents, rather than on the taxpayers of the State, *See, Texas Department of Human Resources* v. *Delley* 581 S.W.2d 519 (Tex. Civ. App.-Dallas 1979 Ref. N.R.E.). A disproportionate number of illegitimate children are born to poor mothers, approximately 1 out of 3 in 1973. *See,* p. 27 *supra.* The interest of the taxpayers in keeping these children off the welfare roll is substantial. Yet § 13.01 frustrates this purpose.

The operation of the one year limitation period under Texas Family Code § 13.01 thus runs directly counter to both of these state interests. By requiring that support rights for illegitimate children be conditioned upon satisfying this one year period, Section 13.01 subordinates the welfare of the children and the reduction of the taxpayers' burden to the prevention of allegedly stale and fraudulent claims of parentage.

The Texas classification thus is not rationally related to any legitimate state purpose. Certainly, under the more stringent standards of review that should be applied here, no justification exists for the distinction by legitimacy of issue; the critical link between classification and valid state purpose cannot be forged. At the same time, the statute at issue affirmatively undermines ancillary state functions, including the imposition of support obligations. Nevertheless, Texas has arbitrarily erected barriers based on the status of legitimacy of birth, excluding children from support rights solely because they are born "illegitimate." The Equal Protection Clause of the Fourteenth Amendment prohibits that result. It is offensive to the beneficent command contained in the phrase equal protection of laws — that like be treated alike — which forbids invidious discrimination of the type contained in the Family Code. It is, as this Court has so frequently recognized, "illogical and

unjust" to wreak the perceived sins of the parents on the head of an innocent child. *See, Weber,* 406 U.S. at 175-176.

IV. Texas Statutory Scheme By Which Illegitimate Children Must Enforce Their Support Rights, As Applied Here, Deprives Appellant Of His Right To Due Process Of Law Under The Fourteenth Amendment.

The constitutional right that *Gomez* conferred upon illegitimate children was the "judicially enforceable right . . . to needed support from their natural fathers," *Gomez,* 409 U.S. at 538, when the state had also posited the same right for legitimate children. Texas had created that right for legitimate children prior to *Gomez,* and after *Gomez,* it purported to do so for illegitimate children as well. See p. 17, *supra.*

The right to support is one akin to those rights that this Court consistently has recognized as property interests that the due process clause of the Fourteenth Amendment protects. *See, Sniadach* v. *Family Finance Corporation,* 395 U.S. 337 (1969), *Goldberg* v. *Kelly,* 397 U.S. 254 (1970), *Mullane* v. *Central Hanover Trust Co.,* 339 U.S. 306 (1950). What the due process clause consequently requires, however, is something more than Texas' statutory scheme for enforcement of the support right — incorporated in Section 13.01-13.09 of Title II — affords. Section 13.01, requiring that paternity suits be brought within one year of a child's birth, when read in statutory context, in fact so burdens the exercise of that support right as to deprive illegitimate children, including appellant here, of their rights under the due process clause of the Fourteenth Amendment.

A. The statutory scheme by which illegitimate children in Texas must enforce their right to support from their natural fathers carries with it two correlative defects making it constitutionally infirm. The first is the one year statute of limitations on paternity actions incorporated in Section 13.01; the second is the absence of any procedure affording a reasonable opportunity for a suit to be brought on the minor's behalf within this period, or for a suitable representative of the

minor, with presumptive knowledge of the limitations period and the significance of the paternity action, to decide nonetheless not to file such a suit. The result, nowhere better shown than in this case, is that an illegitimate child may be barred from pursuing his paternity (and thus support) claim when there has been no constitutionally meaningful opportunity for that child or its representative to be heard on this claim at all. *See, Armstrong* v. *Manzo,* 380 U.S. 545 (1965).

The decisions of this Court compel this conclusion. A fundamental requirement of due process is the "opportunity to be heard." *Grannis* v. *Ordean,* 234 U.S. 385 (1914). "It is an opportunity which must be granted at a meaningful time *and in a meaningful manner." Armstrong* v. *Manzo,* 380 U.S. 545 (1965) (emphasis added). To be meaningful, that opportunity must involve at least some notice of a threatened deprivation of interests that due process protects, *Memphis Light, Gas & Water Division* v. *Cratt* 436 U.S. 1 (1978); *Goldberg* v. *Kelly,* 397 U.S. 290 (1970); *Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950). The procedures governing the initiation and the conduct of any hearing must also be sufficient to ensure a litigant a fair opportunity to present his claim of entitlement (or continued entitlement) to the interests that due process protects. *Memphis Light, Gas & Water Division, supra; Mathews* v. *Eldridge,* 424 U.S. 319 (1976). Moreover, where "persons [are] forced to settle their claims of right and duty through judicial process," *Boddie* v. *Connecticut,* 401 U.S. 371, 377 (1971), the government may be required to facilitate such individuals' access to the judicial process. *Id.* (State required to pay filing fees for indigents in divorce proceedings.)

Here, the opportunity the illegitimate child has to have his paternity/support claim heard simply is not "meaningful" under any understanding of that term permitted by this Court's decisions. In Section 13.01, Texas says that the illegitimate child may enforce his support right only by a paternity suit filed within one year of his birth. But the infant himself is without the ability to assert this right, which *Gomez* conferred

upon *him*. Texas therefore must be understood to have delegated to some other party the responsibility to assert the child's right[23] — and to waive it as well if the paternity suit is not filed within one year of the child's birth.[24] In the usual case, however, the only individual (other than the illegitimate child) who may have a personal interest in establishing paternity is the child's mother.[25] But Texas does not give the

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[23] Texas Rules of Civil Procedure Rule 44 (1981) provides:

Minors, lunatics, idiots, or persons non compos mentis who have no legal guardian may sue and be represented by "next friend" under the following rules:

(1) Such next friend shall have the same rights concerning such suits as guardians have, but shall give security for costs, or affidavits in lieu thereof, when required.

(2) Such next friend or his attorney of record may with the approval of the court compromise suits and agree to judgments, and such judgments, agreements and compromises, when approved by the court, shall be forever binding and conclusive upon the party plaintiff in such suit.

[24] Such a delegation may not, of itself, violate due process. In any case, petitioner here does not assert that it does. This Court thus need not reach the question of whether the due process clause requires that the one year statute for filing paternity suits be tolled during the entire period of a child's minority. That the claim of a legitimate child to support is tolled during his minority, but the claim of an illegitimate child is not, is, however, implicated in the equal protection claim appellant advances here.

[25] In some cases, of course, the interest of the mother may conflict with those of the child, or at least not be congruent with its interest. Thus, while the mother may have interests in securing child support if she is caring for her illegitimate child, this interest may be insubstantial if she is not in fact caring for him. Moreover, the mother may fear to bring a paternity action against the father, for fear of retaliation against her, physical or otherwise. Congress has in fact recognized that there may be "good cause" for the mother to refuse to seek a paternity adjudication and support from the father for her minor children. 42 U.S.C. § 602(a)(26)(B). See pp. 27-28, *supra*.

mother notice of the consequences of failing to file such a suit within one year, even though it would be easy — by a simple notice on all birth certificates for example — for it to do so. Nor is there, in instances in which the mother is aware of the one year statute and wishes to file suit on her child's behalf, any mechanism for ensuring that she will be able to do so — even though here, as in *Boddie* v. *Connecticut*, 401 U.S. 371 (1971), the claim at issue, the right to support, is one that must be settled through the judicial process.

The state, to be sure, also has an interest in securing paternal support for the illegitimate child, if only because of the possibility that if child support is not secured, the child may become a public charge. *See, Dandridge* v. *Williams*, 397 U.S. 471 (1970). Indeed, Title IV-D of the Social Security Act, 42 U.S.C. § 654(4)(1980), *requires* the state to "establish the paternity" of every child eligible for AFDC. *Id.* See pp. 15-16, *supra*. For illegitimate children whose mothers apply for AFDC within one year after their birth, this statutory procedure may normally meet the constitutional requirements of a meaningful opportunity to be heard on their paternity and support claims, assuming the state acts properly. *But, see, Logan* v. *Zimmerman Brush Co.*, 82 Ill. 2d 99, 411 N.E. 2d 277 (1980), *prob. juris.* noted 101 S.Ct. 1345, (1981). The problem, of course, is that there is no reasonable assurance that any individual illegitimate child will be eligible for AFDC within one year of his birth, or, if he is, that his mother will apply on his behalf, thus triggering the state's obligation to "establish paternity" on the child's behalf. 42 U.S.C. § 654. In this case, indeed, appellant's mother did apply for AFDC on his behalf, and assigned his support rights to the state, but not until June, 1978, more than a year after his birth. The state nonetheless brought a paternity suit on appellant's brief, in October, 1978; and it was that suit that was dismissed pursuant to Section 13.01.

In sum, Texas has established a procedure for judicial enforcement of illegitimate children's right to support from their natural fathers. Under that procedure the right to support is

lost without notice of the one year statute of limitations. Because of the absence of notice, both interested individuals and the state may be deprived of a reasonable opportunity to file the paternity suit within that period. That procedure cannot withstand constitutional scrutiny. The opportunity to be heard "in a meaningful manner," *Armstrong* v. *Manzo*,1 380 U.S. 545, 552 (1965) requires more, at least where the individual whose due process rights are at stake is an infant child incapable of protecting his own interests. It requires notice of the one year statute of limitations on paternity actions to a presumptively suitable representative of the illegitimate infant and notice that the failure to establish paternity extinguishes the support claim from his natural father. If such a notice is given, then the representative can make a knowing decision about whether to pursue the infant's support claim. *See, Memphis Light, Gas & Water Division* v. *Cratt*, 436 U.S. 1 (1978), *Goldberg* v. *Kelly*, 397 U.S. 290 (1970). And if due process requires that there be some minimally fair procedure to ensure the *effective* assertion of that claim, *see Matthews* v. *Eldridge*, 424 U.S. 319 (1976), *Boddie* v. *Connecticut*, 401 U.S. 377 (1971), it requires as well a procedure that, unlike the one here, provides a realistic opportunity for the claim to be heard on its merits.

Nor is the statutory scheme at issue, as applied here, any less constitutionally infirm because the statutory grant of support to illegitimate children is accompanied by a statutory limitation on "the procedures . . . to be employed in determining that right . . ." *Arnett* v. *Kennedy*, 416 U.S. 134 (1974) (Rehnquist, J. for himself and Burger, C. J. and Stewart, J.). In *Arnett*, the plurality opinion expressed the view that, in this circumstance, a litigant claiming the substantive right cannot be heard to complain about the accompanying procedures. *Arnett*, 416 U.S. at 154. But the majority of this Court expressed the contrary position. As Justice Powell stated:

> The plurality would thus conclude that the statute . . . determined not only the nature of appellee's property interest, but also the extent of the procedural [due process] protections to which he may lay claim. . . . This view mis-

> conceives the origin of the right to procedural due process. That right is conferred not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in federal employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards. As our cases have consistently recognized, the adequacy of statutory procedures for deprivation of a statutorily created right must be analyzed in constitutional terms.

Arnett, 416 U.S. at 167 (Powell, J. concurring)(footnotes ommitted). See also, *Arnett*, 416 U.S. at 177-78 (White, J. concurring and dissenting) and 216-217 (Marshall, J. dissenting). In any case, unlike the government job at issue in *Arnett*, which was in no way "created by the Constitution," *Arnett* v. *Kennedy*, 416 U.S. 134, 151, quoting *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972), the right of illegitimates to support from their natural fathers is grounded in the Constitution, *Gomez* v. *Perez*, 409 U.S. 535 (1973), if given form by Texas state law. Texas was required by the Constitution to effectuate that right; it failed to do so in a manner consistent with the requirements of the due process clause.

CONCLUSION

The judgment of the Texas Court of Civil Appeals, Thirteenth Supreme Judicial District, insofar as its affirming the trial court's dismissal of Appellant Original Petition, should be reversed.

Respectfully submitted,

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APPENDIX

STATUTORY APPENDIX

VERBATIM FEDERAL AND TEXAS STATUTES AND PROVISIONS

Statutes

1) Federal

45 C.F.R. § 232.42 (a)(1) Good cause circumstances . 26

(a) Circumstances under which cooperation may be "against the best interests of the child." The plan shall provide that the State or local agency will determine that cooperation in establishing paternity and securing support is against the best interests of the child only if:

(1) The applicant's recipient's cooperation in establishing paternity or securing support is reasonably anticipated to result in:

(i) Physical harm to the child for whom support is to be sought;

(ii) Emotional harm to the child for whom support is to be sought;

(iii) Physical harm to the parent or caretaker relative with whom the child is living which reduces such person's capacity to care for the child adequately;

(iv) Emotional harm to the parent or caretaker relative with whom the child is living, of such nature or degree that it reduces such person's capacity to care for the child adequately.

45 C.F.R. § 232.47 Periodic review of good cause determination 26

The plan shall provide that the State or local agency will:

(a) Periodically review, not less frequently than at each redetermination of eligibility required by § 206.10 (a)(9) of this chapter, those cases in which the agency has determined that good cause exists based on a circumstance that is subject to change; and

(b) If it determines that circumstances have changed such that good cause no longer exists, it will rescind its findings and proceed to enforce the requirements of §232.12 of this chapter.

45 C.F.R. § 232.49 Enforcement without the caretaker's cooperation 26

The State plan may provide that:

(a) If the State or local agency makes a determination that good cause exists it will also make a determination of whether or not child support enforcement could proceed without risk of harm to the child or caretaker relative if the enforcement or collection activities did not involve their participation.

(b) This determination will be in writing, contain the agency's findings and basis for determination, and be entered into the AFDC case record;

(c) If the IV-A agency excuses cooperation but determines that the IV-D agency may proceed to establish paternity or enforce support, it will notify the applicant or recipient to enable such individual to withdraw their application for assistance or have the case closed; and

(d) Prior to making a determination under this paragraph, the State or local agency will afford the IV-D agency an opportunity to review and comment on the findings and basis for the proposed determination and consider any recommendation from the IV-D agency.

42 U.S.C. § 602 (a)(26)(B) State plans for aid and services to needy families with children; contents; approval by Secretary 14, 15, 26, 33

(26) provide that, as a condition of eligibility for aid, each applicant or recipient will be required . . .

(B) to cooperate with the State (i) in establishing the paternity of a child born out of wedlock with respect to whom aid is claimed, and (ii) in obtaining support payments for such

applicant and for a child with respect to whom such aid is claimed, or in obtaining any other payments or property due such applicant or such child, unless (in either case) such applicant or recipient is found to have good cause for refusing to cooperate as determined by the State agency in accordance with standards prescribed by the Secretary, which standards shall take into consideration the best interests of the child on whose behalf aid is claimed; and that, if the relative with whom a child is living is found to be ineligible because of failure to comply with the requirements of subparagraphs (A) and (B) of this paragraph, and aid for which such child is eligible will be provided in the form or protective payments as described in section 406(b)(2) (without regard to subparagraphs (A) through (E) of such section);

42 U.S.C. §654(4)(6) State plan for child support .. 15, 34

(4) provide that such State will undertake . . .

(6) provide that (A) the child support collection or paternity determination services established under the plan shall be made available to any individual not otherwise eligible for such services upon application filed by such individual with the State, (B) an application fee for furnishing such services may be imposed, except that the amount of any such application fee shall be reasonable, as determined under regulations of the Secretary, and (C) any costs in excess of the fee so imposed may be collected from such individual by deducting such costs from the amount of any recovery made;

2) State

V.T.C.A., TEX. FAM. CODE Section 11.03 Whom May Bring Suit 24

A suit affecting the parent-child relationship may be brought by any person with an interest in the child, including the child (through a representative authorized by the court), any agency of the state or of a political subdivision of the state, and any authorized agency.

V.T.C.A., TEX. FAM. CODE Section 11.08(c) Contents of Petition 21

(c) The petition and other matters in a suit in which a determination of paternity is sought, if the petitioner is a person other than the alleged father of the child, are confidential, and the district clerk and employees of the clerk may not disclose to any person other than the court, the department, or the party to the suit any matter concerning the suit. The subsection does not apply if and when the suit is set for trial under Subsection (b) of Section 13.03 of this code.

V.T.C.A., TEX. FAM. CODE Section 12.02(a)(b) (1979) Relation of Child to Father 6

(a) A child is the legitimate child of this father if the child is born or conceived before or during the marriage of his father and mother.

(b) A child is the legitimate child of his father if at any time his mother and father have attempted to marry in apparent compliance with the laws of this state or another state or nation, although the attempted marriage is or might be declared void, and the child is born or conceived before or during the attempted marriage.

V.T.C.A., TEX. FAM. CODE Section 12.04 Rights, Privileges, Duties, and Powers of Parent 4, 8, 16

Except as otherwise provided by judicial order or by an affidavit of relinquishment of parental rights executed under Section 15.03 of this code, the parent of a child has the following rights, privileges, duties, and powers:

(1) the right to have physical possession of the child and to establish its legal domicile;

(2) the duty of care, control, protection, moral and religious training, and reasonable discipline of the child;

(3) the duty to support the child, including providing the child with clothing, food, shelter, medical care, and education;

(4) the duty to manage the estate of the child, except when a guardian of the estate has been appointed;

(5) the right to the services and earnings of the child;

(6) the power to consent to marriage, to enlistment in the armed forces of the United States, and to medical, psychiatric, and surgical treatment;

(7) the power to represent the child in legal action and to make other decisions of substantial legal significance concerning the child;

(8) the power to receive and give receipt for payments for the support of the child and to hold or disburse any funds for the benefit of the child;

(9) the right to inherit from and through the child; and

(10) any other right, privilege, duty, or power existing between a parent and child by virtue of law.

V.T.C.A., TEX. FAM. CODE Section 12.05 Rights of a Living Child After an Abortion or Premature Birth 29

(a) A living human child born alive after an abortion or premature birth is entitled to the same rights, powers, and privileges as are granted by the laws of this state to any other child born alive after the normal gestation period.

(b) In this code, "born alive" means the complete expulsion or extraction from its mother of a product of conception, irrespective of the duration of pregnancy, which, after such separation, breathes or shows any other evidence of life such as beating of the heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, whether or not the umbilical cord has been cut or the placenta is attached; each product of such a birth is considered born alive.

V.T.C.A., TEX. FAM. CODE Section 13.01 (1975) Time Limitation of Suit ..... *passim*

A suit to establish the parent-child relationship between a child who is not the legitimate child of a man and the child's natural father by proof of paternity must be brought before the child is one year old, or the suit is barred.

V.T.C.A., TEX. FAM. CODE Section 13.02(a)(b) Pretrial Proceedings: Blood Tests 21, 29

(a) When the respondent appears in a paternity suit, the court shall order the mother, alleged father, and child to submit to the taking of blood for the purpose of one or more blood tests. If the appearance is before the birth of the child, the court shall order the taking of blood to be made as soon as medically practical after the birth.

(b) An order issued under this section is enforceable by contempt, except that if the petitioner is the mother or the alleged father and refused to submit to the blood test, the court shall dismiss the suit. If the respondent is the mother or the alleged father and refused to submit to the blood test, the fact of refusal may be introduced as evidence as provided in Section 13.06(d) of this code.

V.T.C.A., TEX. FAM. CODE Section 13.03(a)(b) Pretrial Proceedings: Appointment of Experts ... 29

(a) The court may appoint one or more experts qualified as examiners of blood types to make the blood tests. The court may determine the number and qualifications of the experts and shall prescribe the arrangements for conducting the tests.

(b) The court may fix a reasonable fee for each court-appointed examiner and may require the fee to be paid by any or all of the parties or by the Texas Department of Human Resources, if the department is a party of the suit, in the amounts and in the manner directed, or the court may tax all or part or none of the fee as costs in the suit.

V.T.C.A., TEX. FAM. CODE Section 13.05(a) Pretrial Proceedings: Effect of Blood Tests 8, 29

(a) At the conclusion of the pretrial conference, if the court finds that the tests show by clear and convincing evidence that the alleged father is not the father of the child, the court shall dismiss the suit with prejudice.

V.T.C.A., TEX. FAM. CODE Section 13.06 Evidence at Trial 29

(a) Unless otherwise permitted by the court on a showing of good cause, a party may call to testify on the results of the blood tests only those experts who testified at the pretrial conference.

(b) A witness called by a party at the trial is that party's witness.

(c) If the blood tests show the possibility of the alleged father's paternity, the court may admit this evidence if offered at the trial.

(d) Evidence of a refusal by the respondent to submit to a blood test is admissible to show only that the alleged father is not precluded from being the father of the child.

V.T.C.A., TEX. FAM. CODE Section 13.07 Settlement 24

The child must be a party to a settlement agreement with the alleged father. The child shall be represented in the settlement agreement by a guardian ad litem appointed by the court. The court must approve any settlement agreement, dismissal, or nonsuit.

V.T.C.A., TEX. FAM. CODE Section 13.41 Venue .. 21

(a) If the alleged father is not the petitioner, the suit shall be brought in the county where the alleged father resides, except that if the alleged father is not a resident or domiciliary of this state and jurisdiction is to be established as provided by Section 11.051 of this code, the suit shall be brought where the mother resides.

(b) If the alleged father is the petitioner, the suit shall be brought in the county where the mother resides, except that if the mother is not a domiciliary of this state and jurisdiction is to be established as provided by Section 11.051 of this code, the suit shall be brought where the child resides.

V.T.C.A., TEX. FAM. CODE Section 13.42(a) Conservatorship, Support, Fees, and Payments 22

(a) In a suit in which a determination of paternity is sought, the court may provide for the Managing and possessory conservatorship and support of and access to the child; except that no alleged father denying paternity may be required to make any payment for the support of the child until paternity is established.

V.T.C.A., TEX. FAM. CODE Section 14.05(a)(b) Support of Child 4, 16, 29

(a) The court may order either or both parents to make periodic payments or a lump-sum payment, or both, for the support of the child until he is 18 years of age in the manner and to the persons specified by the court in the decree. In addition, the court may order a parent obligated to support a child to set aside property to be administered for the support of the child in the manner and by the persons specified by the court in the decree.

(b) If the court finds that the child, whether institutionalized or not, requires continuous care and personal supervision because of a mental or physical disability and will not be able to support himself, the court may order that payments for the support of the child shall be continued after the 18th birthday and extended for an indefinite period.

TEX. REV. CIV. STAT. ANN. Article 5535 (1968) Person Under Disability 16

If a person entitled to bring any action mentioned in this subdivision of this title be at the time the cause of action accrues either a minor, a married person under twenty-one years of age, a person imprisoned or a portion of the time limited for the commencement of the action and such person shall have the same time after the removal of his disability that is allowed to others by the provisions of this title.

Vernon's Ann. Rules Civ. Pro. Rule 44 (1981) May Appear by Next Friend 33

Minors, lunatics, idiots, or persons non compos mentis who have no legal guardian may sue and be represented by "next friend" under the following rules:

(1) Such next friend shall have the same rights concerning such suits as guardians have, but shall give security for costs, or affidavits in lieu thereof, when required.

(2) Such next friend or his attorney of record may with the approval of the court compromise suits and agree to judgments, and such judgments, agreements and compromises, when approved by the court, shall be forever binding and conclusive upon the party plantiff in such suit.

Texas Const. Art. I, Section 16 (1955) Bills of attainder; ex post facto or retroactive laws; impairing obligation of contracts 3

Sec. 16. No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made.